

ARKANSAS SUPREME COURT

No. CR 07-269

ALFONZO HENDRIX
Appellant

v.

STATE OF ARKANSAS
Appellee

Opinion Delivered March 13, 2008

PRO SE APPEAL FROM THE CIRCUIT
COURT OF NEVADA COUNTY, CR
2004-35, HON. KEITH N. WOOD,
JUDGE

AFFIRMED.

PER CURIAM

In 2004, appellant Alfonzo Hendrix was found guilty by a jury of aggravated robbery and sentenced to 120 months' imprisonment. The Arkansas Court of Appeals affirmed. *Hendrix v. State*, CACR 05-180 (Ark. App. Mar. 22, 2006). Subsequently, appellant timely filed in the trial court a verified pro se petition under Ark. R. Crim. P. 37.1. After a hearing, the trial court denied the petition. From that denial, appellant brings this appeal.

Appellant's twenty specified points and sub-points on appeal for reversal can be summarized as: (1) unconstitutional search and seizure, and unconstitutional arrest; (2) judicial conflict of interest and misconduct; (3) prosecutorial misconduct; (4) ineffective assistance of counsel. We do not reverse a denial of postconviction relief unless the trial court's findings are clearly erroneous. *Greene v. State*, 356 Ark. 59, 146 S.W.3d 871 (2004). A finding is clearly erroneous when, although there was evidence to support it, the appellate court after reviewing the entire evidence is left with the definite and firm conviction that a mistake has been committed. *Flores v. State*, 350 Ark. 198, 85 S.W.3d 896 (2002).

The first argument concerns a “knock and talk” search conducted by the police shortly after the assault that led to appellant’s arrest. During that search, the police confiscated clothing from appellant’s home that matched the victim’s description of the perpetrator’s clothes. Additionally, the victim was brought to appellant’s house and identified him as the attacker. At that point, appellant was taken to the police station and later arrested. The clothing and the victim’s identification of appellant were introduced at trial over counsel’s objections.

Rule 37.1 does not provide an opportunity to reargue points that were settled on direct appeal. *Coulter v. State*, 343 Ark. 22, 31 S.W.3d 826 (2000). The court of appeals affirmed the trial court’s rulings that denied suppression of the clothing and identification of appellant. This argument also amounts to a direct attack on the judgment. Rule 37.1 provides a means to collaterally attack a conviction, and is not a method for a direct attack on the judgment or a substitute for an appeal. *Wainwright v. State*, 307 Ark. 569, 823 S.W.2d 449 (1992) (per curiam). Postconviction proceedings under Rule 37.1 do not provide a remedy when an issue could have been raised in the trial or argued on appeal. *Davis v. State*, 345 Ark. 161, 44 S.W.3d 726 (2001). Even constitutional issues must be raised at trial or on direct appeal. *Williams v. State*, 346 Ark. 54, 56 S.W.3d 360 (2001). In this argument, appellant fails to posit a valid basis for postconviction relief.

Next, appellant makes various claims in his points and argument on appeal regarding judicial misconduct and conflict of interest.¹ These conclusory allegations were not contained in appellant’s verified Rule 37.1 petition, raised at his Rule 37.1 petition hearing or supported by facts, and will not

¹Appellant’s claims appear to be that in his criminal trial, the first judge presiding over the matter illegally withdrew from appellant’s case in violation of his due process rights, and that the second judge presiding over the trial was not given the opportunity to rule a second time on appellant’s suppression motions that had been previously denied. He also contends that the trial court improperly refused to grant his petition to proceed in forma pauperis in order to suppress appellant’s ability to obtain documents.

be considered for the first time on appeal. *Ayers v. State*, 334 Ark. 258, 975 S.W.2d 88 (1998).

Appellant next contends that there was misconduct on the part of the prosecutor. To the extent that appellant raised this issue in his original verified Rule 37.1 petition, allegations regarding prosecutorial misconduct do not constitute a proper basis for a Rule 37.1 claim. *Howard v. State*, 367 Ark. 18, 236 S.W.3d 508 (2006). Thus, appellant's argument fails to set forth a valid claim for Rule 37.1 relief.

Finally, appellant makes a number of arguments regarding ineffective assistance of counsel, both in his original Rule 37.1 petition and on appeal. On appeal, we do not consider matters outside the scope of the verified petition filed in the trial court. *Morgan v. State*, 296 Ark. 370, 757 S.W.2d 530 (1988). Appellant's claims of ineffective assistance on appeal are limited to those also raised below: (1) appellate counsel and trial counsel failed to obtain surveillance tapes to prove appellant's innocence; (2) trial counsel failed to cross-examine the victim to bring out inconsistencies in his statements to prove appellant's innocence; (3) trial counsel failed to show that a search warrant issued was obtained illegally; (4) trial counsel failed to seek suppression of the clothing seized from appellant's house or the victim's identification of appellant from the judge who presided over his criminal jury trial.

As to the first allegation of ineffective assistance, when questioned by police regarding his whereabouts at the time of the aggravated robbery, appellant claimed that a friend drove him to a nearby convenience store to purchase food. The police obtained surveillance tapes from the convenience store in order to verify appellant's alibi. Appellant and the driver both testified at trial that appellant remained seated in the car and did not enter the store, and a woman working at the store testified at trial to the same effect. A portion of the tape was introduced at trial that showed

appellant's friend entering the store. However, the tape did not conclusively or clearly show appellant sitting in the car outside of the convenience store, and did not show him entering the store at any time.

Under the standard for showing ineffective assistance of counsel, appellant must prove that counsels' performance was deficient and, as a result, that appellant was deprived of a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984); *Jackson v. State*, 352 Ark. 359, 105 S.W.3d 352 (2003). The burden is on appellant to provide facts to support his claims of prejudice. *Nelson v. State*, 344 Ark. 407, 39 S.W.3d 791 (2001) (per curiam). Allegations without factual substantiation are insufficient to overcome the presumption that counsel is effective. *Id.* Conclusory statements cannot be the basis of postconviction relief. *Jackson, supra*.

Here, appellant fails to demonstrate that any surveillance tape existed that would have conclusively proved his innocence, or that trial counsel or appellate counsel were deficient for failing to obtain such a tape. These conclusory statements are unsupported by facts and cannot be the basis for a claim under Rule 37.1. *Nelson, supra*; *Jackson, supra*.

Next, appellant argues that trial counsel failed to cross-examine the victim about inconsistencies in his statements in order to prove appellant's innocence. The record on direct appeal reflects that trial counsel cross-examined the victim and questioned other witnesses about the clothing obtained from appellant's home, including the allegation that the clothes belonged to a woman who allegedly committed the crime. Counsel also brought out the details of how the victim was injured during the attack when a stick thrown at him bounced off the hood of his car and into his face. Trial counsel moved for directed verdict based on insufficiency of the evidence, and appellate counsel raised insufficiency of the evidence on direct appeal.

As trial counsel cross-examined the victim and other witnesses on the topics raised by appellant, and sufficiency of the evidence was addressed on direct appeal, it appears that appellant is seeking to have this court reexamine his actual innocence in the guise of a claim of ineffective assistance of counsel. A claim of actual innocence is a direct challenge to the sufficiency of the evidence that supported his conviction, and cannot be raised in a Rule 37.1 proceeding. *Sanford v. State*, 342 Ark. 22, 25 S.W.3d 414 (2000). Appellant's argument does not show entitlement to postconviction relief.

In his third ineffective assistance argument, appellant complains that a search warrant obtained by the police to search his house was illegal and used to cover up the prior illegal "knock and talk" search. The attack took place after midnight, and the search warrant was issued in the afternoon of the same day, although appellant maintains that the search warrant was actually issued the day before the attack and his arrest. He further complains that trial counsel failed to make these arguments at trial. Appellant submitted the search warrant and other documents to the trial court during his Rule 37.1 petition hearing.

Other than appellant's contention that the search warrant was wrongfully issued and used for improper purposes, there is no factual evidence to support these claims. As this argument is conclusory and unsupported by facts, *Nelson, supra*, *Jackson, supra*, trial counsel was not ineffective for failing to make an argument that is meritless. *Greene, supra*.

Last, appellant contends that trial counsel failed to renew an effort to seek a ruling by the second judge assigned to his criminal matter in order to suppress the clothing seized from appellant's house or the victim's identification of appellant. The record reflects that in addition to the pretrial suppression motion, trial counsel moved for suppression at trial, which the second judge denied.

Appellate counsel also raised these issues on direct appeal to the court of appeals. Appellant attempts here to reargue these evidentiary issues under the pretext of ineffective assistance of counsel and cannot do so when the claim was addressed on direct appeal. *Coulter, supra*. Appellant fails to state a claim for postconviction relief.

Affirmed.

Gunter, J., not participating.